Filed 7/23/20 P. v. Howard CA2/6
(unmodified opinion attached)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CHARLES HOWARD, Defendant and Appellant.	2d Crim. No. B293360 (Super. Ct. No. 2018006735) (Ventura County) ORDER MODIFYING OPINION AND DENYING REHEARING [CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on July 17, 2020, be modified as follows:

1. On page 2, the last sentence in the first paragraph, "We affirm," is deleted and the following sentences are inserted in its place:

> The trial court imposed a one-year prior prison term enhancement under Penal Code section 667.5, subdivision (b) because of Howard's prior conviction under Penal Code section 459. Because of Senate Bill No. 136, we strike

that enhancement and remand for resentencing. In all other respects, we affirm.

2. On page 10, the first sentence in the first full paragraph is deleted, and the following sentence is inserted in its place:

Moreover, the trial court was aware of the issue before it ruled on Howard's ability to pay fines and fees.

3. On page 11, the sentence under DISPOSITION, "The judgment is affirmed," is deleted and the following sentences are inserted in its place:

The Penal Code section 667.5, subdivision (b) one-year enhancement is stricken and the case is remanded to the trial court for resentencing. In all other respects, we affirm the judgment.

There is a change in judgment.

Appellant's petition for rehearing is denied.

GILBERT, P. J. PERREN, J. TANGEMAN, J.

Filed 7/17/20 P. v. Howard CA2/6 (unmodified opinion)
Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CHARLES HOWARD, Defendant and Appellant.	2d Crim. No. B293360 (Super. Ct. No. 2018006735) (Ventura County) OPINION FOLLOWING ORDER VACATING PRIOR OPINION

On June 24, 2020, our Supreme Court, after granting a petition for review of our decision filed on October 22, 2019, transferred the case back to us and ordered that we vacate our decision and reconsider it in light of *People v. Orozco* (2020) 9 Cal.5th 111. In our prior decision, we concluded that the defendant's crime of receiving stolen property – a motor vehicle (Pen. Code, § 496d, subd. (a)) fell within the resentencing relief provisions of Proposition 47. In light of *Orozco*, we now vacate that part of our decision and affirm the trial court's order denying Proposition 47 relief.

Charles Howard appeals a judgment following his conviction for unlawful driving a vehicle (Veh. Code, § 10851, subd. (a)), a felony (count 1); receiving stolen property – a motor vehicle (Pen. Code, § 496d, subd. (a)), a felony (count 2); and driving without a license (Veh. Code, § 12500, subd. (a)), a misdemeanor (count 3). For count 2 the trial court did not require the jury to make a finding on whether the value of the vehicle exceeded $950. We conclude, among other things, that the trial court did not err in denying Proposition 47 resentencing because the crime involved in count 2 (Pen. Code, § 496d) falls outside the purview of Proposition 47. We also affirm the conviction on count 1 for unlawful driving a vehicle (Veh. Code, § 10851, subd. (a)), and conclude the exclusion of this posttheft driving crime from the purview of Proposition 47 is not irrational and does not deprive Howard of equal protection of the laws. We affirm.

FACTS

On February 20, 2018, James Lewter reported to police that his 1993 Ford Explorer had been stolen. Howard had no permission to take or drive Lewter's car.

On February 26, 2018, Paul Gibson, a security guard at the Surfer's Point parking lot, saw Howard driving a vehicle near the lot. Howard asked Gibson whether he could park in the lot. Gibson told him he could and it would cost $4 to park there. Howard drove the car into the lot.

On that day Police Officer Michael Marietta and his partner went to Surfer's Point. They had received information about people living in a "suspicious vehicle," the 1993 Ford Explorer. As Marietta approached the vehicle, he saw Howard in the rear passenger seat and a female in the front passenger seat.

In a "records check," Marietta learned the car was "reported stolen." There were items of property in the car, including blankets and clothing, that indicated someone had been "living in the car."

Howard told Marietta that a man named "Jimmy" was the driver of the car. Howard said Jimmy had gone for a walk. He told Marietta that Jimmy had "picked him" and his girlfriend up "the night prior." Howard was arrested.

At trial the court instructed the jury on the charged felony offense of unlawfully receiving stolen property – a motor vehicle (§ 496d, subd. (a)), *without instructing* jurors to determine the value of the motor vehicle.

After the jury found Howard guilty of unlawful driving a vehicle (Veh. Code, § 10851, subd. (a)) (count 1), receiving stolen property (§ 496d, subd. (a)) (count 2), and driving without a license (Veh. Code, § 12500, subd. (a)) (count 3), the trial court sentenced Howard to the midterm of two years for count 1, with a consecutive one-year term for a Penal Code section 667.5, subdivision (b) "prior" for "a total term of imprisonment of 36 months." It imposed a two-year sentence on count 2, which it stayed under Penal Code section 654, and a 30-day concurrent sentence on count 3. It ordered Howard to spend eight months in custody and "the remaining 28 months on mandatory supervision." The court's minutes reflect that Howard was ordered to pay a total of $695 as "fees." The court ordered him to pay, among other things, a $250 fine to the State Restitution Fund.

DISCUSSION

Penal Code Section 496d and Proposition 47

Howard contends "Penal Code section 496d is covered by Proposition 47." He notes that under Proposition 47 there is a $950 limit that determines whether the theft crime is a felony or misdemeanor. (Pen. Code, § 490.2.) He claims that consequently the failure to make a finding at trial on the value of the vehicle involved in this theft crime requires reversal of his felony conviction for this offense. We disagree.

In *People v. Orozco, supra*, 9 Cal.5th 111, the court resolved the issue of whether Proposition 47 applies to Penal Code section 496d, subdivision (a), which criminalizes receipt of a stolen vehicle. The court said Proposition 47 amended section 496 involving receiving stolen property. "But Proposition 47 did not amend section 496d." (*Orozco*, at p. 115.) Consequently, Howard is not entitled to resentencing under Proposition 47 for this crime.

Vehicle Code Section 10851 and Proposition 47

Howard contends "any violation of Vehicle Code section 10851, subdivision (a) is entitled to the benefit of Proposition 47." He claims his conviction for unlawful driving a vehicle under Vehicle Code section 10851 must be reversed. We disagree.

Vehicle Code section 10851, subdivision (a) provides, in relevant part, "Any person who *drives or takes* a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, . . . is guilty of a public offense . . . ." (Italics added.)

The jury found Howard guilty of the felony crime of "unlawful driving or taking of a vehicle, to wit: 1993 Ford Explorer" in violation of Vehicle Code section 10851, subdivision (a).

In *Page*, our Supreme Court held Vehicle Code section 10851 involves both theft and non-theft crimes. " 'Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft . . . . [A] defendant convicted under section 10851[, subdivision] (a) of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction . . . .' " (*People v. Page*, *supra*, 3 Cal.5th at p. 1183.) " 'On the other hand, unlawful driving of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete . . . . Therefore, a conviction under section 10851[, subdivision] (a) for posttheft driving is not a theft conviction . . . .' " (*Ibid.*) Consequently, to be eligible under Proposition 47, the defendant "must show not only that the vehicle he or she was convicted of taking or driving was worth $950 or less [citation], but also that the *conviction was based on theft of the vehicle rather than on posttheft driving* [citation] . . . ." (*Page*, at p. 1188, italics added.) "Where the evidence shows a 'substantial break' between the taking and the driving, posttheft driving may give rise to a conviction under Vehicle Code section 10851 distinct from any liability for vehicle theft." (*Ibid.*)

Howard contends his posttheft driving offense under Vehicle Code section 10851 falls within Proposition 47. But, as shown by *Page*, Vehicle Code section 10851 involves two categories of crimes – taking a vehicle, a theft offense, and posttheft driving, which is not a theft offense. Because it is

outside the scope of Proposition 47, the offense of "posttheft driving . . . does not require proof of vehicle value in order to be treated as a felony." (*People v. Lara* (2019) 6 Cal.5th 1128, 1137.)

The People note they "presented their case solely on [Howard] having engaged in post-theft driving . . . ." The prosecutor told the jury, "I only have to show that he either took or drove. *And in this particular case, it's the People's argument that the defendant drove* that vehicle without the owner's consent." (Italics added.) The People therefore relied on the "nontheft variant of the Vehicle Code section 10851 offense." (*People v. Lara*, *supra*, 6 Cal.5th at p. 1138.) The six-day period between the date of the theft and Howard's arrest shows a substantial break between the theft and the driving. (*Id.* at p. 1137.) Howard has not shown that he falls within the category of being convicted of a theft offense, and consequently his claim that his driving offense falls within Proposition 47 fails. (*People v. Page*, *supra*, 3 Cal.5th at pp. 1187-1188.)

Equal Protection

Howard contends his posttheft driving conviction under Vehicle Code section 10851 makes him "similarly situated to those charged under the exact same section with taking a vehicle" and the difference in treatment violates "equal protection."

" '[T]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " (*People v. Brown* (2012) 54 Cal.4th 314, 328.) But the taking and posttheft driving offenses under section 10851 are different crimes – one is a theft offense, the other is not. " ' "Persons convicted of *different* crimes are not similarly

situated for equal protection purposes." ' " (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1565.)

Moreover, even had Howard shown he was similarly situated, the result would not change. "When an equal protection case does not involve a suspect classification such as race and does not infringe on a fundamental right, the legislative classification will be upheld whenever it has a rational relationship to a legitimate state interest. [Citations.] This is true even if the law seems unwise or works to the disadvantage of a particular group." (*People v. Parker* (2006) 141 Cal.App.4th 1297, 1309.) "A criminal defendant has no vested interest ' "in a specific term of imprisonment or in the designation [of] a particular crime [he or she] receives." ' " (*People v. Turnage* (2012) 55 Cal.4th 62, 74.) Because of "the Legislature's broad discretion in forming criminal justice policy," the courts examine challenges to classifications in this area under the "deferential rational relationship test." (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 897.)

Here there is a rational basis for the distinction in treatment between the two offenses. The electorate or the Legislature often must make categorical "line-drawing" choices between relief for different groups of offenders, and such categorical choices do not constitute unlawful discrimination simply because one group is omitted. (*People v. Chatman* (2018) 4 Cal.5th 277, 283.) "It is both the prerogative and the duty of the Legislature to define degrees of culpability and punishment, and to distinguish between crimes in this regard." (*People v. Turnage*, *supra*, 55 Cal.4th at p. 74.) "Courts routinely decline to intrude upon the 'broad discretion' such policy judgments entail." (*Ibid.*) Absent a showing of arbitrary or invidious discrimination

the choice to classify some crimes as felonies and others as misdemeanors generally falls within the legislative prerogative. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 839-841.)

Proposition 47 and Penal Code section 490.2 were adopted to change the law regarding *theft* crimes. Howard's offense is not a theft crime. (*People v. Page*, *supra*, 3 Cal.5th at pp. 1187-1188.) Howard contends the electorate did not intend to exclude his driving offense from the purview of Proposition 47. But he has not cited a portion of Proposition 47 or Penal Code section 490.2 that relates to non-theft driving crimes. The categories of reform in Penal Code section 490.2 involve theft offenses. The absence of Howard's non-theft driving offense from the crimes included in Proposition 47 refutes his position. There is a categorical distinction between theft crimes and driving offenses. Reform legislation that categorically excludes offenses that are not intended to be included within that reform is not unconstitutional. (*People v. Turnage*, *supra*, 55 Cal.4th at p. 74; *People v. Wilkinson, supra*, 33 Cal.4th at pp. 839-841; *People v. Romo* (1975) 14 Cal.3d 189, 196-197; *People v. Dunn* (2016) 2 Cal.App.5th 153, 157-158.)

Moreover, there is a significant difference in conduct between offenders who take vehicles and those who decide to continue driving after the vehicle theft offense ends. The People claim offenders who elect to continue to drive stolen vehicles post theft "are more likely to be distracted by the possibility that they might get caught, and are more likely to lead law enforcement on high-speed pursuits . . . ." The electorate and the Legislature have an interest in prohibiting stolen vehicles from being driven on streets and highways. The offender who drives a stolen vehicle is in possession of a potentially dangerous lethal weapon

– a moving automobile. This difference in the type of crime, the conduct, the distinct area of highway safety, and the potential danger to the public and law enforcement for this offense supports a rational basis to impose a greater punishment here than for the minor theft offenses in Proposition 47. (*People v. Wilkinson*, *supra*, 33 Cal.4th at pp. 839-841; *People v. Romo*, *supra*, 14 Cal.3d at pp. 196-197; *People v. Dunn*, *supra*, 2 Cal.App.5th at pp. 157-158.)

The Dueñas Decision

Relying on *People v. Dueñas*, *supra,* 30 Cal.App.5th 1157, Howard contends: 1) the "court facilities and court operations assessments" (Pen. Code, § 1465.8; Gov. Code, § 70373) imposed against him "must be reversed because the court did not hold an ability to pay hearing"; and 2) the $250 restitution fine must be stayed until the People prove he has the ability to pay it.

In *Dueñas*, the court held a defendant has a due process right not to be assessed certain fines and fees beyond his or her ability to pay. Consequently, the trial court must hold a hearing on the defendant's ability to pay court facilities and court operations assessments before imposing them, and it must stay execution of Penal Code section 1202.4 restitution fines "until the People prove that [the defendant] has the present ability to pay it." (*People v. Dueñas*, *supra*, 30 Cal.App.5th at p. 1173; *id.* at pp. 1167, 1172-1173.)

The People claim Howard forfeited this issue by not raising a due process claim in the trial court and not requesting an ability-to-pay hearing.

Howard's counsel requested the trial court to reduce the restitution fine (Pen. Code, § 1202.4) "down to the minimum of $250." This request was based on Howard's inability to pay the

higher restitution fine. Howard's counsel asked the court to consider "his financial circumstances."

Moreover, the trial court knew the issue before it was Howard's ability to pay fines and fees. The court found Howard did not "have the ability to pay for the cost of the presentence investigation report." It said it would impose the "minimum" of $250 for the restitution fine. At trial the court heard testimony about Howard living in a car. The court said Howard did not "have a job."

Howard's counsel did not mention the due process issue in *Dueñas*. But the sentencing hearing took place on September 20, 2018. *Dueñas* was not decided until January 8, 2019. In *People v. Castellano* (2019) 33 Cal.App.5th 485, 489, the court said, "[N]o California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay." It said, "When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture." (*Ibid*.)

In *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1155, the court said, "*Dueñas* applied law that was old, not new." It ruled the defendant forfeited a challenge to fees because his trial counsel "failed to object to the assessments or the restitution fine." (*Id.* at p. 1153.) But that is not the case here, and the trial court knew the issue involved ability to pay.

Howard claims the trial court imposed "criminal conviction assessment" (Gov. Code, § 70373) and Penal Code section 1465.8 fees against him. But, as the People note, the minute order reflects these fees, but the reporter's transcript shows that the

court did not impose those fees at the sentencing hearing. "The record of the oral pronouncement of the court controls over the clerk's minute order." (*People v. Lopez* (2013) 218 Cal.App.4th Supp. 6, 12; see also *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.) Consequently, those fees were not imposed. (*Ibid.*)

Howard contends under *Dueñas* the trial court's order that he pay a $250 restitution fine (Pen. Code, § 1202.4) must be stayed because the People did not prove he had the ability to pay it. (*People v. Dueñas*, *supra*, 30 Cal.App.5th at pp. 1172-1173.)

The People contend Howard is not entitled to that relief because the trial court reduced that fine from $750 to $250 "based on his ability to pay" and Howard "agreed to pay" that reduced fine. We agree there is no need to remand regarding fees.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

Adrian Dresel-Velasquez, under appointment by the Court of Appeal, for Defendant and Appellant.

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